Supreme Court, U.S.
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No. 93-1023

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DONALD BARTH,
Petitioner,

v.

JOSEPH D. DUFFY, Director,
United States Information Agency, *et al.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Rehabilitation Act, which prohibits discrimination against individuals with disabilities, applies with equal force to applicants for employment as to incumbent employees.

PARTIES TO THE PROCEEDING

Parties to the proceeding are Petitioner, Donald Barth and Respondents, Joseph D. Duffy, Director, United States Information Agency and Chase G. Untermeyer, Associate Director, Voice of America.

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PETITION FOR A WRIT OF CERTIORARI

Donald Barth hereby petitions this Court for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The court of appeals' decision is reported as *Barth v. Gelb*, 2 F.3d 1180 (D.C. Cir. 1993), and is attached hereto as Appendix A (1a-20a). The district court's opinion is published at 761 F. Supp. 830 (D.D.C. 1991) and is appended as Appendix B (21a-37a).

JURISDICTION

This case is before the Court on petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. On August 27, 1993, that court affirmed the district court's ruling dismissing petitioner's complaint of handicap discrimination under the Rehabilitation Act, 29 U.S.C. § 794a(a)(1). By Order entered November 16, 1993, the Chief Justice extended the time within which petitioner could file this petition to and including December 27, 1993. This petition is, therefore, filed within the time allowed by law. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATEMENT

This case presents the question whether the Rehabilitation Act, 29 U.S.C. §§ 791-95a, applies with different force to applicants for employment as opposed to incumbent employees. Specifically, this case presents the question whether an employer can establish that providing a specific accommodation is an "undue hardship" solely because the individual seeking the accommodation is an applicant and not an incumbent.

Petitioner Donald Barth is a long-time employee of the Voice of America (a component of the United States Information Agency). In 1988, he applied for a position of radio engineer to serve at VOA's overseas radio relay stations. The USIA had elected to classify and fill these relay station engineer positions within the Foreign Service; because Mr. Barth was a civil service employee, however, he had to be converted to the Foreign Service to be eligible for appointment.

To be converted to the Foreign Service, Mr. Barth and his wife had to obtain a medical clearance from the State Department. The State Department denied this clearance, however, because Mr. Barth is an insulin-dependent diabetic. The State Department's denial notwithstanding,

Mr. Barth was still eligible for appointment if VOA waived the medical clearance requirement. Mr. Barth requested that VOA do so but VOA refused. VOA's refusal, and the question whether that refusal violated the Rehabilitation Act, are the crux of this case.

As the court below held, the Rehabilitation Act obligated VOA to appoint Mr. Barth unless it could prove that accommodating him would constitute "an undue hardship on the operation of its program." 29 C.F.R. § 1613.704(a); App. A at 16a. Mr. Barth proposed a simple and, indeed, commonplace accommodation: hire him with the express limitation that he would only be assigned to posts with adequate medical facilities to monitor and treat his conditions.

VOA conceded that the specific accommodation Mr. Barth sought, limited assignability, is routinely provided to incumbent Foreign Service officers (or their dependents) who develop limiting medical conditions in the course of their careers. App. A at 16a. So too, VOA conceded that it offers this accommodation to incumbent Foreign Service officers for nonmedical reasons (*e.g.* assigning families to posts with schools appropriate for their children). App. A at 18a. Indeed, VOA invoked the burden of accommodating its existing workforce (handicapped and nonhandicapped alike) as the justification for its refusal to offer the same accommodation to Mr. Barth.

The court below held that because Mr. Barth was an applicant, and not an incumbent, VOA had no duty to accommodate him:

> [Mr. Barth's] arguments overlook the benefits that agencies derive from accommodating the special needs of existing employees, which they do not gain from serving those of applicants. A willingness to accommodate incumbent employees increases the likelihood that they—and their knowhow—will be retained by the employing agency. . . . It will also contribute to employee morale and, presumably, to

productivity. Thus there is economic logic as well as moral truth behind the intuition that distinguishes between "family" and "stranger" and the level of obligation owed to each. Robert Frost captured that intuition in his poem, "The Death of the Hired Man":

> Home is the place where, when you have to go there,
>
> They have to take you in.

The Poetry of Robert Frost at 38 (Edward C. Lanthem ed., 1967). Mr. Barth may knock at the door, but he is not family, and his handicap does not give him the right to be treated as such. An agency is entitled both to take the measure of the burden imposed by an accommodation net of its benefits and to take account of the duty of care, whether legal or not, that is owed to employees who develop problems while on the job. Accordingly, we decline to find that the disparate treatment Mr. Barth complains of constitutes handicap discrimination within the meaning of the Act.

App. A at 18a-19a.

Thus, the issue raised in this petition is squarely framed: had Mr. Barth been a VOA Foreign Service employee when he developed diabetes, VOA would have accommodated him by limiting his assignment to posts where he could receive adequate medical care. Yet because he was handicapped when he applied, VOA determined that he was ineligible for consideration. This petition poses the question whether Rehabilitation Act can sanction VOA's "handicapped need not apply" hiring policy.

STATUTORY PROVISION INVOLVED

Section 505(a)(1) of the Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(1) provides, in pertinent part:

> The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 . . . shall

> be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment . . .

REASONS FOR GRANTING THE PETITION

This case presents questions of substantial public importance concerning the scope of Congress' principal vehicles for preventing handicap discrimination in the workplace, the Rehabilitation Act of 1973 and the Americans with Disabilities Act. In defiance of plain statutory language, the court below has construed the Rehabilitation Act to create standards for applicants different from those for employees, holding that handicapped applicants are not protected to the same extent as handicapped employees.

Congress intended that the federal government serve as the model employer of the handicapped. Thus, in extending the Rehabilitation Act's protections into the private sector, Congress incorporated much of the Rehabilitation Act, including its definition of "undue hardship," into the Americans with Disabilities Act, 42 U.S.C. §§ 12101-213. Not only does the decision below flout Congress' intent that the federal government lead by example in employing the handicapped, it also eviscerates the ADA. The decision reduces the ADA's mandate from breaking down barriers to the entry of disabled Americans into the workforce to merely helping retain employees who may become disabled.

The court below is the only circuit to discern a distinction in the Rehabilitation Act's coverage of applicants versus employees. In reaching this aberrant conclusion, the court drew on established Title VII analysis and, in particular, analysis of religious discrimination cases under Title VII. Thus, because its analysis cannot be limited to handicap discrimination cases, the decision below infects not only Rehabilitation Act and ADA jurisprudence, it threatens Title VII's religious discrimination protections

as well. Review by this Court is necessary to bring the court below back into the fold and to prevent its spurious distinction between applicants and employees from gaining currency in other courts and in other employment discrimination contexts.

1. This case has broad implications that reach far beyond the particulars of VOA's refusal to hire Mr. Barth. The court below has held that the Rehabilitation Act does not require employers to offer the same accommodation to applicants that they routinely offer to current employees. App. A at 18a-19a. By holding that the Rehabilitation Act provides a lesser degree of protection for applicants than for employees, the court below has dramatically reduced the Act's coverage. That decision, left undisturbed, threatens to reduce the Rehabilitation Act to a mere vestige.

By its terms, the Rehabilitation Act applies to all federal agencies (29 U.S.C. § 791(b)) and to all entities that receive federal financial assistance. 29 U.S.C. § 794 (a). This coverage reaches thousands of employers and millions of employees. But the scope of the Act is even broader, for Congress intended that the federal government serve as the "model employer of the handicapped." *Carter v. Bennett*, 840 F.2d 63, 65 (D.C. Cir. 1988). *See also Prewitt v. United States Postal Service*, 662 F.2d 292, 307 (5th Cir. 1981) (reviewing legislative history).

The example Congress intended the federal government to set is not, however, the example set by the decision below. While the court below accords greater protection to handicapped employees than handicapped applicants, this Court has recognized that the Rehabilitation Act "expressly requires federal employers to develop affirmative action programs on behalf of handicapped persons." *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979); 29 U.S.C. § 791(b). Affirmative action programs are principally recruitment tools. Thus, the lower court's conclusion that handicapped applicants are

relegated to second class status is utterly inconsistent with Congress' emphasis on affirmative action in the Rehabilitation Act.

The language of the Rehabilitation Act simply does not admit of the distinction drawn by the court below. In addition to speaking specifically in terms of affirmative action, Congress explicitly gave both "applicants and employees" recourse to the remedies and procedures of Title VII to enforce their rights. 29 U.S.C. § 794a(1)(a). The protections found in Title VII apply not only to existing employment relationships, but to cases where an applicant is denied employment for a proscribed reason as well. *Connecticut v. Teal*, 457 U.S. 440, 448 (1982); *Simmons v. Lyons*, 746 F.2d 265, 270 (5th Cir. 1984). And, significantly, no other court has found the distinction in the Rehabilitation Act made by the court below. *See Prewitt*, 662 F.2d at 307-08 ("federal government employers must make reasonable accommodation for handicapped job applicants"); *Mantolete v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985) ("employer has duty under the [Rehabilitation] Act to . . . determine what accommodations are necessary to enable the applicant to perform the job"); *Gardner v. Morris*, 752 F.2d 1271, 1278 (8th Cir. 1985) ("§ 501 requires the federal government to act affirmatively in order to reasonably accommodate handicapped employees or applicants").

In construing the Rehabilitation Act to provide less protection to job applicants than to current employees, the court below has strayed from its sister circuits and forged new law plainly at odds with Congress' intent. Review by this Court is necessary to bring the court below back into harmony with the plain language of the statute, the teachings of this Court and the holdings of the other circuits.

2. Because the issue of reasonable accommodation arises in several employment contexts, the impact of the decision reaches well beyond the Rehabilitation Act. The court below noted, for example, that reasonable accommodation analysis under the Rehabilitation Act closely parallels that of religious discrimination under Title VII. App. A at 6a-7a. Yet courts interpreting Title VII's religious discrimination protections have not distinguished between applicants and incumbents. *See, e.g., Trans World Airlines v. Hardison*, 432 U.S. 63, 74 (1977) (an employer "must make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees"); *Minkus v. Metropolitan Sanitary Distr.*, 600 F.2d 80, 82 (7th Cir. 1979) (employer has "duty to reasonably accommodate the religious practices of job applicants"). Under Title VII, "prospective employees" who require accommodation for their religious beliefs are provided the same protection as "employees." *See* 42 U.S.C. § 2000e-2 (making it an "unlawful employment practice" to "fail or refuse to hire or to discharge any individual" for proscribed reasons).

Similarly, Congress drew extensively and explicitly from the Rehabilitation Act in enacting the Americans with Disabilities Act. *See* S. Rep. No. 101-116, 101st Cong., 1st Sess. 2 (1989) ("The ADA incorporates many of the standards of discrimination set out in regulations implementing section 504 of the Rehabilitation Act of 1973 . . ."). The ADA uses the same broad definition of disability as the Rehabilitation Act, and similarly requires employers to make "reasonable accommodation" to the disabilities of a "job applicant or employee," unless such accommodation would constitute an "undue hardship" to the employer. 42 U.S.C. § 12112(b). *See also* Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, Sec. 503(b), 106 Stat. 4344, 4424, 29 U.S.C. § 791(g) (clarifying that the standards used to determine violations under the Rehabilitation Act are the same standards applied under Title I of the ADA). Accordingly, because

these acts are so interrelated, the analysis below encroaches upon the ADA.

Thus, the lower court's limitation of applicants' rights cannot be confined to Rehabilitation Act cases; left unchecked, the court's spurious distinction will infect Title VII and ADA jurisprudence as well. Applying the lower court's rationale in religious discrimination cases would lead to absurd and plainly unintended results. For example, an employer could refuse to hire an applicant who was unwilling to work on Sundays, but nonetheless would be required to accommodate an incumbent who similarly refused to work on Sundays. *See, e.g., Equal Employment Opportunity Comm. v. Ithaca Industries, Inc.*, 849 F.2d 116, 118-19 (4th Cir.) (*en banc*), *cert. denied*, 488 U.S. 924 (1988) (reversing *Jordan v. North Carolina Nat'l Bank*, 565 F.2d 72 (4th Cir. 1975), and holding that employer was obligated to accommodate employee unwilling to work on Sundays). Similarly, the decision below would transform the ADA from "a sledgehammer" [1] for dismantling the barriers facing Americans with disabilities into a peashooter; by the lower court's rationale, the ADA would do little more than prevent employers from discharging employees who become disabled. Review by this Court is necessary to assure that Congress' accommodation mandates are not so trivialized.

3. To say that the Rehabilitation Act does not distinguish between applicants and employees is not, of course, to say that whenever an employer provides an accommodation to a particular employee it must similarly provide that accommodation to all applicants. Rather, the Rehabilitation Act requires a case-by-case analysis to determine whether the required accommodation would result in an "undue hardship."

---

[1] *See* Remarks on Signing the Americans with Disabilities Act of 1990, *July 26, 1990*, 46 Pub. Papers 1067, 1069 (1991).

But this is not the situation presented in this case [2] and it is not what the court below has held. The court below held that applicants *as a class* are entitled to less protection under the Rehabilitation Act because there are purportedly

> benefits that [employers] derive from accommodating the special needs of existing employees, which they do not gain from serving those of applicants.

App. A at 18a.

There is no suggestion in the language of the Rehabilitation Act or in any of its caselaw that Congress intended to foster this novel distinction. Indeed, the only authority the court below could cite to support its position was the poetry of Robert Frost. *See* App. A at 18a-19a (*quoting The Poetry of Robert Frost* at 38 (Edward C. Lathem ed., 1967)). The court's erudition notwithstanding, the Rehabilitation Act was Congress' to write. The court below erred in writing into the Rehabilitation Act a distinction that Congress eschewed.

---

[2] The only hardships VOA suggested would ensue were it to hire Mr. Barth were impaired flexibility of assignments and lower esprit de corps. But these "hardships" are the same whether VOA is accommodating an employee or an applicant. That is, there is no suggestion here that hiring Mr. Barth would have imposed any greater burden on VOA than VOA would have suffered had Mr. Barth become disabled while on the job.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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December 27, 1993

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 2, 1992 Decided August 27, 1993

No. 91-5199

DONALD BARTH,

Appellant

v.

BRUCE S. GELB, DIRECTOR, UNITED STATES INFORMATION AGENCY, *et al.*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil No. 89-02967)

Michael J. Kator argued the cause for appellant. With him on the brief were *David H. Shapiro* and *Katherine L. Garrett.*

Diane M. Sullivan, Assistant United States Attorney, argued the cause for appellees. With her on the brief were *Jay B. Stevens,* United States Attorney at the time the brief was filed, and *John D. Bates* and *R. Craig Lawrence,* Assistant United States Attorneys.

Before SILBERMAN, BUCKLEY, and D. H. GINSBURG, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: Donald Barth, a severe diabetic, appeals a judgment in favor of his employer, the Voice of America, on his claim that the VOA illegally discriminated on the basis of handicap by failing to clear him for service at the VOA's overseas radio relay stations. The district court found that the agency was justified in denying Mr. Barth an overseas assignment because the special arrangements required to accommodate his medical condition would have imposed an undue burden on its operations. Mr. Barth's principal challenge is directed to the court's allocation to him of the ultimate burden of proof on that issue. Because a claim of undue burden is an affirmative defense in actions under the Rehabilitation Act of 1973, we find that the burden of proving it should have been placed on the VOA. But because we also find that this error was harmless, we affirm the district court's judgment.

I. BACKGROUND

Donald Barth is a Washington-based computer specialist and employee of the VOA who decided he wanted a change in assignments and a chance to see the world. Accordingly, in 1988, he applied for admittance into the permanent Foreign Service, out of which engineering positions at the VOA's twelve overseas radio relay stations are staffed. Mr. Barth passed all requirements for admittance into the Service, except that he failed a State Department medical clearance examination designed to assess his availability for worldwide service. Mr. Barth suffers from an advanced and degenerative form of diabetes requiring the care of a skilled endocrinologist to control the diabetes, plus an array of other specialists (in ophthalmology, for example) to control its complications. The State Department found that Mr. Barth could not serve worldwide, but only in locations with advanced medical facilities.

After the denial of the medical clearance, Mr. Barth requested a medical waiver from the VOA. His particular suggestion was that the VOA grant a limited waiver restricting his assignments to posts with suitable medical facilities. After protracted deliberations, the VOA denied Mr. Barth's waiver request without a written statement of reasons. Upon exhausting his administrative remedies, Mr. Barth brought suit under the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701-96i (1988), asking the court to order his assignment to a suitable overseas relay station position and to award him backpay.

After a four-day bench trial, the district court found that Mr. Barth's diabetic condition was the sole reason for his exclusion from the VOA's Overseas Radio Relay Station Program and that, although the waiver panel had not recorded its findings, it had focused on whether a reasonable accommodation could be made to his handicap. The court noted that the entire corps of American overseas relay station engineers consists of only seventy persons divided among the twelve stations, most of which were located in remote, sparsely populated areas. It found that Mr. Barth "could function at only three or four posts" and that

> [t]he thin staffing at each post required flexibility of assignment, put a premium on workers not subject to serious health risks, and offered few options for initial assignment of Mr. Barth. Accepting applicants who could basically only work at a few non-hardship posts would be considered unfair to other Specialists and detrimental to morale and success of the program.

Barth v. Gelb, No. 89-2967, Memorandum opinion at 18 (D.D.C. Apr. 24, 1991) ("Mem. op."). The court concluded "as a matter of law" that accommodating Mr. Barth by limiting his assignments would "place an undue burden on the VOA program," and it granted judgment

in favor of the agency. *Id.* at 18-19. This appeal followed.

II. Analysis

A. The Burden of Proof

Mr. Barth's principal claim is that he was improperly assigned the burden of proving that the requested accommodation would not consititute an undue hardship. Specifically, he objects to the court's holding, in reliance on our decision in *Carter v. Bennett*, 840 F.2d 63, 65-66 (D.C. Cir. 1988), that "Mr. Barth has the ultimate burden of proof." Mem. op. at 7. The court explained its allocation of the burden in the following footnote:

> The Court of Appeals has stated that in a Rehabilitation Act case claiming wrongful denial of a federal job, the plaintiff has the initial burden to make a prima facie showing that reasonable accommodation of his handicap was possible. The burden then shifts to the defendant to show inability to accommodate. Credible evidence in that regard shifts the burden back to the plaintiff. *Carter v. Bennett*, 840 F.2d at 65.

Id. at 7 n.7.

Mr. Barth claims that, *Carter* notwithstanding, this allocation runs afoul of our recent decision in *Langon v. Department of Health & Human Services*, 959 F.2d 1053 (D.C. Cir. 1992). He argues that, under *Langon*, the burden of proving undue hardship rests with the agency. *See Langon*, 959 F.2d at 1060 ("The burden of showing undue hardship was on [the government agency].") Although the apparent contradiction between these two cases is easily explained (the language cited in *Carter* dealt with the burden of production; that in *Langon*, with the burden of persuasion), Mr. Barth's objection to the district court's assignment of the burden in this case is well taken.

Because of the ambiguities in the precedent of this and other circuits on the burdens of proof in Rehabilitation Act cases, we will begin with a review of the applicable law. We will then address the allocation of those burdens in this case.

1. Statutory Framework

The Rehabilitation Act of 1973 governs employee claims of handicap discrimination against the Federal Government. Its basic tenet is that the Government must take reasonable affirmative steps to accommodate the handicapped, except where undue hardship would result.

As originally enacted, section 501 of the Act simply spurred governmental efforts to employ the handicapped through such measures as affirmative action plans and review committees. *See* 29 U.S.C. § 791. Section 504 of the Act prohibited discrimination against the handicapped by recipients of federal funds. *See id.* § 794.

In 1978, however, Congress decided that stronger measures were needed on behalf of persons subjected to handicap discrimination by government agencies; and it enacted several provisions to supply them. Among these was section 505(a)(1), 29 U.S.C. § 794a(a)(1), which allows private litigants to enforce rights under section 501 in suits employing the "remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16)." That section appears in Title VII of the Civil Rights Act of 1964, which is entitled "Equal Employment Opportunity."

At the same time, Congress expanded section 504 to cover federal agencies as well as recipients of federal funds and revised it to require the promulgation of regulations "to carry out" the amendments. *See* Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2955, 2982 (1978). Congress also added

section 505(a)(2), 29 U.S.C. § 794a(a)(2), which provides that the "remedies, procedures, and rights" set forth in Title VI ("Nondiscrimination in Federally Assisted Programs") of the Civil Rights Act be available in connection with complaints under section 504. Because these statutes are duplicative, some courts have limited claims against the Government as employer to actions brought under section 501, while others have allowed litigants to proceed under either provision. *See Milbert v. Koop,* 830 F.2d 354, 357 (D.C. Cir. 1987) (collecting cases). We have "strongly suggest[ed] that litigants proceed under section 501, *see id.* at 357; and Mr. Barth has complied with this suggestion.

A principal issue under the Act is whether the rights Congress so clearly enacted are to be enforced through the adaptation of civil rights law or through the promulgation of administrative regulations. In light of section 505(a)(1)'s terse command that the "remedies, procedures, and rights set forth in section 717 of the Civil Rights Act" be made available in connection with complaints brought under section 501, it would seem reasonable for courts to look to the body of law developed under Title VII for guidance in enforcing comparable rights protected under the Rehabilitation Act. *See Milbert,* 830 F.2d at 356 (section 501 incorporate[s]" Title VII provisions); *Judd v. Billington,* 863 F.2d 103, 105 (D.C. Cir. 1988) (same).

Section 717 of the Civil Rights Act, 42 U.S.C. § 2000e-16, prohibits discrimination in Federal employment on the basis of "race, color, religion, sex or national origin." Under section 2000e-16, the closest analogy to discrimination on the basis of handicap is discrimination on the basis of religion. Where as race, color, sex, and national origin are nearly always irrelevant to an employee's ability to perform a federal job, handicaps, like religious beliefs, are of a great variety and are often relevant to an employee's job performance. Under Title

VII, employers may not discriminate on the basis of religion, which is defined to include:

> all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Id. § 2000e(j).

An alternative, but related, source of authority defining the rights of the handicapped under sections 501 and 504 are the regulations promulgated, respectively, by the Equal Employment Opportunity Commission ("EEOC") and the Department of Health and Human Services ("HHS"). These regulations, which are substantially identical, are codified at 29 C.F.R. § 1613.704 (1992) and 45 C.F.R. § 84.12 (1992) respectively. Each is entitled "Reasonable accommodation" and, as is clear from their references to undue hardship, each is modeled on Title VII's prohibition of religious discrimination.

The regulations promulgated under section 501, with which we are here concerned, contain the following relevant provisions:

> § 1613.702 Definitions.
>
> (a) *Handicapped person* is defined . . . as one who . . . [h]as a physical or mental impairment which substantially limits one or more of such person's major life activities. . . .
>
> . . . .
>
> (f) *Qualified handicapped person* means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others. . . .
>
> . . . .

§ 1613.704 Reasonable accommodation.

(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

29 C.F.R. §§ 1613.702, 1613.704. These regulations have remained unchanged since before the adoption of the Rehabilitation Act's 1978 amendments.

2. Burden of Proof Standards

A court's allocation of the burdens of proof in a federal agency handicap discrimination case will be determined in part by whether the court looks to Title VII case law or to the EEOC regulations for guidance. The EEOC regulations direct that "[a]n agency shall make reasonable accommodation [for qualified handicapped

persons] unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 29 C.F.R. § 1613.704(a). This rule apparently calls for a two-part approach in which plaintiffs bear their usual burden of showing a breach of duty—namely, that they are qualified handicapped persons who have been denied reasonable accommodations for their handicaps—but in which agencies may "demonstrate," as an affirmative defense, that fulfilling this duty would impose "undue hardships" on their programs.

Section 505(a)(1), on the other hand, states, in relevant part:

> The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16) . . . shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint. . . .

29 U.S.C. § 794a(a)(1). Section 717 prohibits discrimination on the basis of race, color, religion, sex, or national origin. Yet, although religious discrimination is a closer analog to handicap discrimination than either race or sex discrimination, courts focusing on this language have tended to look to the allocations of the burdens of proof developed for Title VII race and sex discrimination complaints in shaping rules under the Rehabilitation Act. *Compare McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973) (setting forth a three-step approach to the proof of race discrimination) *and Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981) (elaborating *McDonnell Douglas* and applying it to a sex discrimination claim) *with Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486 (10th Cir. 1989) ("Although the Supreme Court has never ruled on the issue, lower courts have implemented a two-step

procedure for evaluating claims and allocating burdens of proof under [Title VII's religious discrimination] provisions."). Thus, courts allocating burdens of proof under the Rehabilitation Act have been prone to adapt and employ the familiar principles of *McDonnell Douglas* as elaborated by *Burdine*. *See, e.g., Prewitt v. United States Postal Service*, 662 F.2d 292, 308 (5th Cir. 1981) (applying a three-step burden of proof under the Rehabilitation Act); *Gardner v. Morris*, 752 F.2d 1271, 1280-81, 1282 (8th Cir. 1985) (same).

Burdine places on the plaintiff an initial burden of producing sufficient evidence to support a prima facie case of discrimination. If the plaintiff establishes a prima facie case, the burden shifts to the defendant, which must then produce evidence of an articulable non-discriminatory reason for the challenged action. If the defendant produces such a reason, the plaintiff then bears the ultimate burden of persuading the trier of fact that the reason was pretextual and that intentional discrimination had in fact occurred. *Burdine*, 450 U.S. at 252-56.

The allocation of the burdens of production in the first two steps is designed to "sharpen the inquiry" into an "elusive" fact—an employer's discriminatory motivation. *Id.* at 255 n.8. Because of the difficulties inherent in establishing such motivation, the Supreme Court placed only a modest initial burden on a Title VII plaintiff; namely, that he establish that although qualified for an available position, he was "rejected under circumstances which give rise to an inference of unlawful discrmination." *Id.* at 253. Once this burden is met, it becomes necessary for the employer to produce admissible evidence of legitimate reasons for the plaintiff's rejection, thus "fram[ing] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.* at 255-56. Such a demonstration having been made, it remains the plaintiff's ultimate burden to show that he was in fact the victim of intentional

discrimination. *Id.* at 253; *St. Mary's Honor Crt. v. Hicks,* 61 U.S.L.W. 4782, 4784 (U.S. June 25, 1993). In short, the requirement of only a minimal prima facie showing strips the defendant of the ability to remain silent as to its motive while recognizing the plaintiff's ultimate obligation to prove that motive's illegality.

An individual bringing an action under section 501 of the Rehabilitation Act, however, may face a quite different situation from that faced by plaintiffs charging racial discrimination under Title VII. Unlike a person's race, an employer may legitimately take a handicap into consideration in determining whether an applicant or employee is qualified for a particular position. Thus, while an agency would never admit to basing an employment decision on race, agencies frequently acknowledge that they have taken a person's handicap into consideration. Under such circumstances, the ultimate purpose of *Burdine*'s requirements is typically achieved from the outset. *See Doe v. New York University,* 666 F.2d 761, 776 (2d Cir. 1981).

It is apparent, then, that the *Burdine* test is not equally applicable to all cases brought under section 501. To illustrate this point, we describe three of the various categories of handicap discrimination cases that may be brought under that section. The first is one in which the employing agency asserts that it refused a job application, or denied an employee a promotion or discharged him, for reasons unrelated to the person's handicap. *See, e.g., id.* (*Burdine* allocation "may be appropriate for § 504 suits in which the defendant disclaims any reliance on the plaintiff's handicap"); *Carter,* 840 F.2d at 64 (blind employee discharged on stated basis that employee's "job performance and attitude were unsatisfactory"). A second category involves suits in which the employer challenges a plaintiff's claim that he is a "qualified handicapped person" who, with "reasonable accommodation, can perform the essential functions of the position in ques-

tion." 29 U.S.C. § 1613.702(f). In these cases, the agency will usually contend that no reasonable accommodation is available. *See, e.g., Treadwell v. Alexander*, 707 F.2d 473, 476, 478 (11th Cir. 1983) (agency permitted to refuse employment to a person capable of walking only one mile per day when its job requirements include the ability to walk six hours per day and stand for another hour); *see also Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979) (educational institution receiving federal funds not required by section 504 to make "a fundamental alteration in the nature of [its] program" in order to accommodate a hearing-impaired student). In a third category we have those cases, such as the one before us, in which the employing agency offers the affirmative defense of "undue hardship on the operation of its program." 29 C.F.R. § 1613.704(a). This last may at times merge with the second, however, as indicated by the regulation's reference to "the nature and the cost" of a proposed accommodation as an example of "undue hardship." *Id.* § 1613.704(c)(3).

The first of these categories involves the sort of inquiry into subjective facts—the employing agency's true motivation—that the *Burdine* three-step approach was designed to address. But in the last two categories, the fact that the plaintiff's handicap was taken into explicit account in the agency's employment or personnel decision is acknowledged. These cases deal with objective claims that may be tested through the application of traditional burdens of proof. In the second category, for example, a plaintiff must establish that (a) he is handicapped but, (b) with reasonable accommodation (which he must describe), he is (c) able to perform "the essential functions" of the position he holds or seeks. *See* 29 C.F.R. § 1613.702(f); *see also id.* § 1613.704(a), (b). As in the usual case, it would then be up to the employing agency to refute that evidence. The burden, however, remains with the plaintiff to prove his case by a preponderance of the evidence.

In the third category, the agency invokes the affirmative defense of "undue hardship," an inquiry for which the regulations provide three factors for consideration:

> (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget;
>
> (2) the type of agency operation, including the composition and structure of the agency's work force; and
>
> (3) the nature and the cost of the accommodation.

29 C.F.R. § 1613.704(c). In such a case (as in any other in which an affirmative defense is raised) the agency has the burden of proving the undue hardship. *See, e.g., Langon,* 959 F.2d at 1060 ("burden of showing undue hardship was on HHS"); *cf. Patterson v. New York,* 432 U.S. 197, 202 (1977) (noting, in a criminal context, that "at common law the burden of proving . . . affirmative defenses—indeed all . . . circumstances of justification, excuse, or alleviation—rested on the defendant") (citations and internal quotation marks omitted).

As a general matter, a reasonable accommodation is one employing a *method of accommodation* that is reasonable in the run of cases, whereas the undue hardship inquiry focuses on the hardships imposed by the plaintiff's preferred accommodation in the context of the particular agency's operations. *See* 29 C.F.R. § 1613.704 (b) (listing various reasonable methods of accommodation as examples of "reasonable accommodation); 29 C.F.R. § 1613.704(c) (listing considerations bearing on undue hardship by reference to the hardship imposed on "the agency in question"). As noted earlier, a grey area will arise where a proposed accommodation is so costly or of such a nature that it would impose an undue burden on the employer's operations. Thus, an accommodation would be both unreasonable and impose an undue burden "if it either imposes undue financial and admin-

istrative burdens on [an agency] or requires a fundamental alteration in the nature of [its] program." *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987) (internal quotation marks and citations omitted).

Finally, we note that, although we have revisited the question of allocating burdens of proof under the Rehabilitation Act from first principles, nothing we have said contradicts any of our earlier decisions. *Shirey v. Devine*, 670 F.2d 1188 (D.C. Cir. 1982), involved the question of whether the Government must "cease any discrimination," not whether it had fulfilled an affirmative duty to accommodate. *Id.* at 1191. *Carter* suggested that the burden of persuasion might remain with the employee or applicant even in a case where the employer asserts the affirmative defense that accommodation would be unduly burdensome. *See* 840 F.2d at 65-66 ("Credible evidence that reasonable accommodation is not possible or would be unduly burdensome shifts the burden back to the plaintiff to rebut the employer's evidence."). In that case, however, the burdensomeness of accommodation was not at issue. The employer denied that it had discharged the employee because of his blindness. *See* 840 F.2d at 64. In *Langon*, the one statement in tension with what we have said is the court's suggestion that the employer (not the employee) had the burden of persausion on the question of the requested accommodation's reasonableness. *See* 959 F.2d at 1061 ("If [the employee] could [perform the essential functions of her position], the burden [was] on the agency to show why the accommodation was not a reasonable one."). That statement, however, is dictum because it was not necessary to reach the issue of the agency's burden in order to reverse the district court's grant of summary judgment. Therefore, nothing in our precedents forecloses the analysis we have employed today.

3. The Burden of Proof in this Case

In this case, the issue has been joined in a manner that places us squarely within the third category described above. Therefore, the district court erred in two respects on the question of burdens of proof: Because the VOA acknowledged that it had refused Mr. Barth's application on account of his handicap, the court should not have invoked the *Burdine* three-step scheme; and, more to the point, it wrongly assigned the burden of persuasion on the undue hardship issue to Mr. Barth instead of the agency.

The VOA does not claim that limiting Mr. Barth's overseas assignments to posts at which adequate medical facilities are available would be unreasonable in the abstract. Rather, it asserts that the requested accommodation would result in undue hardship as a result of considerations peculiar to its operation; essentially, its need for flexibility in the difficult task of rotating a small number of radio engineering specialists among twelve far-flung relay stations, most of them "hardship posts," while trying to maintain the efficiency of its operation. The VOA notes that its non-hardship posts, the only ones at which Mr. Barth would be eligible to serve, function as short-term havens for its specialists. Yet, given the "thin staffing" of VOA posts, every transfer from, say, Liberia to Munich, Germany, implies the need for another transfer in the opposite direction. Mr. Barth, however, would be medically disqualified for such transfers, thereby imposing additional burdens on the remaining engineers. For these and other operational reasons, the VOA maintains that its staffing problems would be greatly compounded by admitting someone into the Service who from the outset had Mr. Barth's serious limitations on assignability.

The accommodation Mr. Barth seeks is assignment to one of three or four "non-hardship" posts in the VOA radio relay system. As the VOA admits that it restricts

the assignments of certain of its current radio specialists for medical and family reasons, there can be no claim that such an accommodation would mark a "fundamental alteration" in the nature of the VOA's program. The agency argues instead that permanently assigning Mr. Barth to non-hardship postings would impose, in these particular circumstances, undue hardship on the VOA. This is an affirmative defense that the VOA had the burden of proving. The issue to be resolved, then, is whether it has met that burden. But because the district court erred in assigning the ultimate burden of proof to Mr. Barth, we must also decide whether that error was harmless. *See Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1022-23 (D.C. Cir. 1990) (discussing standards for harmless error analysis in civil cases).

In *Williams,* we stated that in determining whether an error in a civil case was harmless, "[t]he proper inquiry is 'whether the error itself had substantial influence. If so, or if one is left in grave doubt, the [verdict] cannot stand.' . . . This inquiry 'involves an assessment of the likelihood that the error affected the outcome of the case.'" *Id.* at 1023 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946), and *Jordan v. Medley,* 711 F.2d 211, 218 (D.C. Cir. 1983)).

Mr. Barth does not claim that the Government failed to produce evidence of undue hardship. Therefore, the only conceivable prejudice from the district court's error is the possibility that its misallocation of the ultimate burden of proof affected the outcome of the case. For this to occur, the evidence presented would have to be in sufficient balance so that the outcome would depend on who had the burden. *See, e.g., United States ex rel. Bilyew v. Franzen,* 686 F.2d 1238, 1248 (7th Cir. 1982) ("If the evidence is closely balanced, then common sense indicates there is a reasonable possibility that who bears the burden of proof will determine the outcome."); *cf. New York Life Ins. Co. v. Taylor,* 147 F.2d 297, 301 (D.C. Cir. 1945)

(finding harmful error in civil case where burden of proof by preponderance of evidence was placed on wrong party because "the evidence was such that the result might well have depended on where the ultimate burden of proof lay").

Here, the district court examined the administrative record and concluded that the VOA's decision that Mr. Barth's handicap could not be reasonably accommodated "was proper and consistent with the requirements of the Rehabilitation Act." Mem. op. at 18. The court observed that "[t]he thin staffing at each post required flexibility of assignment, put a premium on workers not subject to serious health risks, and offered few options for initial assignment of Mr. Barth." *Id.* It found that "at the time he sought waiver Mr. Barth could function only at three or four posts." *Id.* Mr. Barth does not challenge the court's findings. To the contrary, he complains that

> the government attempts to characterize this as a fact-bound appeal, claiming appellant has asserted that the District Court's findings are 'clearly erroneous.' The government must have read a different brief, for we have no quarrel here with the facts as found by the district court.

Reply Brief for Appellant at 1 (citation omitted); *see also* Fed. R. Civ. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous . . . .").

Our examination of the records satisfies us that the VOA introduced sufficient evidence to support a claim of undue hardship by virtue of the loss of essential operational flexibility that would have resulted from an attempt to accommodate Mr. Barth's medical needs. And because Mr. Barth does not challenge the district court's findings of fact, we must accept those findings as true. Viewing the evidence through the lens of those findings, we conclude that it was not so closely balanced that the court's error

in assigning the burden of persuasion to Mr. Barth would have affected the outcome.

B. Mr. Barth's Other Claims

Mr. Barth asserts that the district court has made two "significant legal errors," in addition to the misallocation of the burden of proof, "each of which alone justifies reversal." Reply Brief for Appellant at 1. He maintains, first, that the court erred in allowing the VOA to refuse to offer an accommodation to an applicant for employment that it has extended to current employees. Mr. Barth notes that the VOA has made special accommodations for employees who have incurred medical problems while on duty overseas or whose children have particular educational needs. From this, he argues that (1) if such limitations on the assignment of an existing employee do not create an undue hardship, similar restrictions on the assignment of an applicant will not do so; and (2) if the VOA restricts the assignments of a current employee for medical or family reasons, it must be equally willing to restrict the assignment of a handicapped applicant.

These arguments overlook the benefits that agencies derive from accommodating the special needs of existing employees, which they do not gain from serving those of applicants. A willingness to accommodate incumbent employees increases the likelihood that they—and their knowhow—will be retained by the employing agency. *Cf.* Mem. op. at 2 (describing the VOA's difficulties in maintaining a skilled work force and measures it has taken in response). It will also contribute to employee morale and, presumably, to productivity. Thus there is economic logic as well as moral truth behind the intuition that distinguishes between "family" and "stranger" and the level of obligation owed to each. Robert Frost captured that intuition in his poem, "The Death of the Hired Man":

> Home is the place where, when you have to go there,
> They have to take you in.

The Poetry of Robert Frost at 38 (Edward C. Lathem ed., 1967). Mr. Barth may knock at the door, but he is not family, and his handicap does not give him the right to be treated as such. An agency is entitled both to take the measure of the burden imposed by an accommodation net of its benefits and to take account of the duty of care, whether legal or not, that is owed employees who develop problems while on the job. Accordingly, we decline to find that the disparate treatment Mr. Barth complains of constitutes handicap discrimination within the meaning of the Act.

In his second claim of legal error, Mr. Barth argues that the district court improperly accepted "speculative assertions of impaired management flexibility and employee morale." Reply Brief for Appellant at 2. He contends that an agency "must establish 'undue hardship' through objective evidence, not mere supposition, of the actual impact of any proposed accommodation on specific aspects of its program." Brief for Appellant at 17. He supports this argument with statements from Title VII religious discrimination cases. *See EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988); *Brown v. General Motors Corp.*, 601 F.2d 956, 961 (8th Cir. 1979); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975). We, however, find nothing in these cases more remarkable than the proposition that evidence becomes less persuasive as it becomes more speculative.

Mr. Barth also contends that even if the VOA had offered admissible evidence of an adverse effect on employee morale, it was inappropriate to take that factor into account. For support, he relies on cases holding, for example, that racial animus may not be used to defend race-based policies or practices. *See, e.g., Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that community hostility to mixed-race marriages does not excuse a policy that disadvantages mixed-race couples in disputes over child custody).

This argument, however, confuses animus against the handicapped with the morale effects of a particular means of accommodating them. Consider an extreme example: An agency is asked to accommodate an employee with extra-sensitive eyes by moving operations underground. It seems clear that in considering this request, the agency could not properly take into account the other workers' animus against the handicapped or their resentment over the handicapped's protected legal status. But this does not mean the agency must ignore the probable effects of subterranean working conditions on the morale of other employees, however pure of heart.

An element of the undue hardship calculus cited in the EEOC regulation is the relationship between the number of employees and the size of the agency's program. 29 C.F.R. § 1613.704(c). This factor is relevant, we presume, precisely because the degree of the imposition of a particular accommodation on non-handicapped employees as a group, and the effects of such impositions on a small work force, are legitimate concerns under the Rehabilitation Act.

III. Conclusion

For the foregoing reasons, the judgment of the district court is

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 89-2967

DONALD BARTH,

Plaintiff,

v.

BRUCE S. GELB, *et al.*,

Defendants.

April 24, 1991

David H. Shapiro, Katherine L. Garrett, Washington, D.C., for plaintiff.

Diane M. Sullivan, Asst. U.S. Atty., Washington, D.C. for defendants.

MEMORANDUM

GESELL, District Judge.

This is an action by a "qualified handicapped person" alleging discrimination in violation of the Rehabilitation Act, 29 U.S.C. § 791, 791(a), as amended. Plaintiff Donald Barth is an insulin-dependent diabetic. He is an engineer and is presently Chief of the Field Support Section, Computer Services Division of the Voice of America ("VOA"), a component of the United States Information Agency ("USIA"). In 1988, he decided to change from this domestic civil service job and sought placement in the permanent Foreign Service of the Department of State as

a Foreign Service Specialist/Radio Engineer with VOA's overseas Radio Relay Station program. He was not selected, and the sole reason for his nonselection was his diabetic condition. Matters of first impression under the Act are presented by his discrimination claim, which has been vigorously contested. The case was tried to the Court over four days and post-trial briefs and proposed findings of fact and conclusions of law were submitted. The Court's findings of fact and conclusions of law follow.

Background

VOA is the world-wide broadcasting arm of the United States government. It prepares programs in Washington, D.C., and broadcasts them world-wide by radio through a system of relay stations located around the world. The relay stations are managed by VOA Foreign Service Specialists.

In 1988, VOA had 12 overseas relay stations, located in Antigua; Belize; Botswana; Bangkok, Thailand; Colombo, Sri Lanka; Kavala, Greece; Liberia; Munich, Germany; the Philippines (3 sites); Quesada, Costa Rica; Rhodes, Greece; and Tangier, Morocco.

VOA's relay stations receive and transmit programs virtually 24 hours a day, 7 days a week, 52 weeks a year. They are staffed primarily by local citizens, known as Foreign Service Nationals. The entire corps of American relay station engineers overseas consists of approximately 70 Foreign Service Specialists spread over the twelve stations. These 70 employees staff five levels of positions at the various sites: station manager, deputy station manager, plant supervisor, assistant plant supervisor, and technician.

By the mid-1980s, there were many VOA station managers nearing retirement. Because of the highly specialized nature of these positions and the difficulties presented with prior classes recruited only from the VOA Civil

Service who were unable to convert to the Foreign Service, VOA decided in 1988 to recruit technically qualified people directly into the Foreign Service and train them for four to six months at the VOA relay station in Greenville, North Carolina, before assigning them to overseas stations.

Mr. Barth, who was a VOA civil servant at the time, was one of 16 individuals selected from a larger group of applicants with a view to assignment overseas following the training period stateside. In addition to his technical training and VOA experience, he already had top security status. He was therefore qualified in all respects except that, like all applicants initially so selected, his selection was subject to medical clearance for himself and his wife. *See* 29 U.S.C. § 3901(a)(4); 3 State Department Foreign Affairs Manual § 684.7. As part of these standard medical clearance process, Mr. Barth underwent a physical examination performed by his own doctor, in this case his endocrinologist, Dr. Michael F. Ball.

Because Mr. Barth's health made him unable to satisfy the statutory requirement that he be available for world-wide foreign service, 22 U.S.C. § 3901(a)(4), the State Department Office of Medical Services ("State Med") denied him clearance automatically after a review of his condition by Dr. Sam Zweifel, then the Assistant Medical Director for Medical Clearances of the Department of State. Insulin-dependent diabetics are not considered available for world-wide service and State Department regulations apparently so provide.[1]

Mr. Barth does not challenge this initial denial of world-wide clearance (Tr. 6). Rather, he took advantage of a subsequent waiver process, and it is the VOA's denial of a medical waiver that is the bone of contention here.

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[1] Dr. Zweifel testified to the existence of such a regulation, Tr. 270-71, although it was never provided or cited to the Court.

Agencies such as VOA that employ Foreign Service personnel have established procedures for granting a waiver of medical clearance for entry into one of their specific programs to an individual denied world-wide medical clearance by State Med. A waiver panel is convened to consider each application. A State Med doctor advises the waiver panel, but VOA has authority to grant waivers even without the concurrence of State Med. The actual decision is made by VOA's personnel director after considering the recommendation of the waiver panel.

Mr. Barth's waiver application was processed with particular vigor on his part in an effort to offset the strong adverse views of State Med. He submitted letters from three treating physicians, including Dr. Ball. However, the acting personnel director, Janice Brambilla, denied Mr. Barth a waiver of medical clearance on October 21, 1988. Prior to this decision, a panel consisting of John Welch, then Chief, VOA Foreign Service Personnel and Policy Division; Richard Belt, VOA Foreign Service Personnel Adviser; Edward Kulakowski, VOA Personnel Operations Staff; Lorie Nierenberg, Assistant General Counsel, USIA; and Fred Adams, VOA Office of Engineering and Technical Operations, had unanimously recommended denial after considering the matter over a period of time. Dr. Zweifel gave medical advice to the panel based on the medical information supplied by Mr. Barth. David Sites, from VOA's Engineering Office, and Helen Murphy, from USIA's Equal Employment Opportunity Office, also aided panel deliberations but, like Dr. Zweifel, did not vote. Mr. Adams and Mr. Sites had each served at VOA relay stations abroad.

After exhausting all administrative review unsuccessfully, Mr. Barth filed this action.[2]

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[2] Mr. Barth testified that in January 1989 he applied for a two-year "excursion tour" as a VOA relay station worker abroad but that he got no response. *See* PX 36. Defendants claim they have no record of this application. The matter before the Court, as

The Issue

The Foreign Service is fully subject to the requirements of the Rehabilitation Act.[3] The terms of section 791 of the Rehabilitation Act require each federal agency to maintain an affirmative action program for the hiring, placement and advancement of handicapped persons. The issues litigated in Rehabilitation Act cases turn largely not on this statutory provision but on the regulations issued thereunder, 29 C.F.R. sections 1613.701 *et seq.* Pursuant to the regulations, federal agencies must provide "reasonable accommodation" to "qualified handicapped persons" unless the agency can show that such accommodation would create "undue hardship" for the agency. *See Carter v. Bennett*, 840 F.2d 63 (D.C.Cir. 1988).[4] The parties have stipulated that Mr. Barth is insulin-dependent, which is a physical impairment within the meaning of 29 C.F.R. § 1613.702(b), *i.e.*, a physiological condition affecting the endocrine system, and that he is a "qualified handicapped person" within the meaning 29 C.F.R. § 1613.702(f), fully qualified if not for

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framed by Mr. Barth, is his application to the permanent foreign service, not his eligibility for any temporary foreign assignment. *See* Complaint ¶¶ 15, 17; Tr. 650.

[3] Indeed, the Secretary of State is required by statute to ensure that members of the Service "are free from discrimination on the basis of . . . handicapping condition," 22 U.S.C. § 3905(b)(1), and this Foreign Service nondiscrimination statute explicitly provides that it "shall not be construed to extinguish or lessen" rights provided by the Rehabilitation Act. 22 U.S.C. § 3905(e)(4).

[4] The statute itself provides that a court "[i]n fashioning an equitable or affirmative action *remedy* [emphasis added] . . . may take into account the reasonableness of the cost of any necessary work place accommodation . . . ."

The new Americans With Disabilities Act of 1990, *see* Public Law 101-336 section 101, creates statutory definitions of the terms "qualified" handicap, "reasonable accommodation" and "undue hardship" that closely track the Rehabilitation Act regulations. The employment provisions of the new statute, however, are not applicable to the federal government. *See* § 101(5)(B)(i).

his handicap for a Radio Engineer Specialist position within the Foreign Service in the VOA Relay Station program.[5]

The issue is whether VOA, in refusing to hire Mr. Barth as a Foreign Service Specialist, failed to provide him with "reasonable accommodation" as required by the Rehabilitation Act.

Mr. Barth contends that the VOA mishandled his waiver application and failed to make an accurate assessment of his condition, which could have been to reasonably accommodated without undue burden. He seeks back pay, training and assignment, preferably to the Munich, Germany, station, plus attorney fees.[6]

VOA urges the contrary and supports its position.

The respective contentions of the parties must be considered against the facts and circumstances developed before the waiver panel as expanded or qualified by the trial record.

Mr. Barth has the ultimate burden of proof.[7]

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[5] Section 1613.702(f) defines a "qualified handicapped" as "a handicapped person who, with or without reasonable accommodations, can perform the essential functions of the position in question without endangering the health and safety of the individual or others . . ." In this case, it is not disputed that Mr. Barth is able to meet the regular on-the-job requirements of a Foreign Service Specialist and that it is only his diabetes that may prevent him from assignment to some of the relay station locations. *Compare Southeastern Community College v. Davis*, 442 U.S. 397, 406-11, 99 S.Ct. 2361, 2367-69, 60 L.Ed.2d 980 (1979) (more restrictive definition of "otherwise qualified" applied to federal government contractors and beneficiaries under the Rehabilitation Act than that applied to the federal government itself).

[6] Section 794a of 29 United States Code codified a private right of action under the Rehabilitation Act by providing that the remedies, procedures and rights established in Title VII discrimination cases against the government, 42 U.S.C. § 2000e-16, are available in Rehabilitation Act cases.

[7] The Court of Appeals has stated that in a Rehabilitation Act case claiming wrongful denial of a federal job, the plaintiff has

Discussion

In determining whether VOA failed to reasonably accommodate Mr. Barth, the crucial regulation is 29 U.S.C. § 1613.704:

> (a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.
>
> (b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment of devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.
>
> (c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

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the initial burden to make a prima facie showing that reasonable accommodation of his handicap was possible. The burden then shifts to the defendant to show inability to accommodate. Credible evidence in that regard shifts the burden back to the plaintiff. *Carter v. Bennett*, 840 F.2d at 65. By conclusion of the plaintiff's case the size and complexity of the record caused the Court to take the pro forma defense motion under advisement, and the Court herein assumes that a prima facie showing was made.

The issue for the Court is whether VOA's waiver denial decision met these standards. However, the evidence in this case showed that, instead of citing this regulation, VOA acted with reference to the State Department's Foreign Affairs Manual, section 684.7-5, which sets the standard for considering a waiver of medical clearance without regard to whether the waiver applicant meets the Rehabilitation Act standard of a "qualified handicapped person." The Foreign Affairs Manual permits waiver where the responsible personnel officer determines that:

(1) Overseas duty will not involve undue personal risk to the employee.

(2) Adequate medical skills and/or facilities exist and are available at the posts.

(3) The medical problem does not indicate the likelihood of substantial interruption to duty by excessive use of sick leave and/or undue cost for medical treatment/evacuation.

(4) The assignment abroad is in the interest of the Government.

Denial of waiver is not automatic by any means, as the Stipulations of the Parties demonstrates in summarizing experience from 1983 to 1990. For example, in 1987, five medical waivers for VOA applicants were sought and only one was denied. Waiver decisions must, however, take into account the wide variety of working conditions that a Foreign Service Specialist may encounter as well as the often limited number of positions available.

Of the 12 VOA relay stations overseas, all but two (Kavala and Munich) have tropical or semi-tropical climate. Malaria is a significant factor in Africa, and dysentery is prevalent in third-world countries. The stations in most instances are not in cities or near the U.S. Embassy but in more remote areas which are sparsely settled. State Med has only 37 doctors, about 42 nurses,

5 to 6 laboratory technologists, and 6 to 10 psychiatrists available to service some 250 locations around the world involving 35,000 Foreign Service employees and dependents. Small remote stations, like most VOA Relay Stations, are not served by government doctors, and local nationals must be relied on for medical care. Medical skills available in this fashion vary widely in accessibility, training and technical support. There are usually language difficulties to overcome. Inadequate medical services when medical emergencies arise can require transport from the station area by special charter or other sometimes costly arrangements improvised at the time. These conditions exist in varying degrees at most stations. Only Munich, Bangkok and the Philippines were considered by VOA as not having any of these problems affecting medical care.

A Foreign Service Specialist normally has a tour of duty that obliges him to serve at more than a single station. He or she must gain experience to move through the grades from technician to assistant plant supervisor, plant supervisor, deputy station manager to station manager. This is achieved, in part, by movement of specialists to different sites as vacancies develop [8] and also to meet emergency conditions requiring added manpower. Political developments or natural disasters at a particular site may force its suspension or closing, as has occurred in the past, requiring transfers on short notice. In the Philippines, for example, an earthquake shut off a station from outside help, and later a site was attacked by rebel forces. The station in Liberia was shut down and all personnel evacuated during the recent military conflict there. Specialists who have been highly trained on the

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[8] Normally when a vacancy opens at one of the overseas posts, the VOA Foreign Service Specialists bid for it. Selection is made by VOA's Assignment Panel, based on qualifications, prior assignments, medical requirements, and family needs such as schooling for dependents.

job sometimes need to be transferred to meet temporary illness or for rest from stress that accompanies most assignments under the staffing and living conditions previously mentioned. It is obvious that flexibility of assignment is an essential feature of the program. As indicated, there are only 70 Specialist positions world-wide spread over the twelve stations. The stations have as few as three Specialists assigned, and, accordingly, management strives to promptly fill vacant posts.

It is a significant indication of working conditions that ultimate selection for permanent service is a protracted process not solved simply by a waiver. VOA Foreign Service Specialists are still known as "career candidates" during a three-to-five-year probationary period. Approximately one-third of trained Specialist career candidates for the Relay Station positions do not make it through their probationary period.

The physical working conditions and available medical resources were discussed by the panel in relation to Mr. Barth's ability to serve. The panel was aided by information, not always precisely accurate but regularly updated and assembled by the Department of State, designed to record medical and technical assistance available at each Foreign Service post. It was apparent to the committee, as it was apparent to the Court after trial, that Mr. Barth required very prompt access to informed care if his condition suddenly changed due to infection or some other cause.

The panel was correctly advised that Mr. Barth's disease was one that becomes progressively worse, that his individual condition was already very complex, that he was prone to infection, which would raise blood sugar levels and necessitate close monitoring and attention within hours, that he would be endangered by stress and particularly by dehydration, and that, accordingly, the assignment to the program overseas would involve a serious risk for him. It is clear there was a thorough dis-

cussion of these and related matters. However, neither the discussions nor the particular reasons relied on for the panel's recommendation denying the waiver were recorded.

Mr. Barth has never contended, nor would it have been reasonable to do so, that "reasonable accommodation" required that VOA permanently assign a doctor and necessary facilities to be stationed with him as he moved from post to post. Instead, the focus of the trial and of the underlying VOA decision centered on the number of posts to which Mr. Barth could reasonably be sent without undue risk to himself given the medical facilities already available at the various sites. While a general rule of thumb favoring adaptability to at least 75 percent of posts was mentioned by several VOA officials, it was recognized that exceptions have been made for certain handicapped applicants, and in some instances a waiver has been granted where the waiver committee found there were adequate facilities at "the great majority" or even "a majority" of VOA overseas posts. (Stipulations 11-22, Tr. 206.)

Opinions differed to some extent among members of the waiver panel, and participants may have lacked precise current information as to some posts. The participants agreed that Mr. Barth's health needs could be met at the posts at Munich, Bangkok, and the Philippines. Other posts were more questionable. Dr. Zweifel felt that Colombo, Sri Lanka "might be acceptable" because of a particular competent doctor he knew there. There appears to have been a consensus that Mr. Barth might be available for at most five or six stations out of twelve.

While there is no adequate written record of the reasons for denial of the Barth waiver, there is no doubt about what occurred. The Committee unanimously recommended denial, and Ms. Brambilla, the acting personnel director, accepted the recommendation after interviewing some participants in the panel decision and

speaking with Dr. Zweifel of State Med. During the trial she was extensively questioned about every aspect of her decision.

Mr. Barth was not waived because:

1. His disease was serious, complicated and subject to progressive deterioration.

2. He needs to have a doctor the same day in the event of any attack.

3. He could not tolerate conditions at at least half the posts, and conditions in some of the available posts could become more adverse. There was genuine concern that Mr. Barth would face life-threatening risks if assigned away from the three most suitable posts.[9]

4. The job involved more flexibility and wider availability than Mr. Barth could offer.

5. Individuals already employed who required reassignment because of illness contracted on the job needed postings to the more sanitary, less stressful posts, and morale would suffer if these posts were permanently staffed by Specialists unable to work elsewhere.

In summary, the government's interest would not be served. The risks were great, and waiver in Mr. Barth's case was unfair to existing employees overseas because it would hamper the program. Both medical advice and advice from individuals with field experience received by Ms. Brambilla were unanimous to this effect.

The concerns of the Committee and the personnel officer who made the ultimate decision were genuine, not

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[9] Moreover, VOA's Director of Engineering and Technical Operations testified that for a person entering the Foreign Service at Mr. Barth's level, out of the three posts, there were no available positions in Munich or Bangkok, and only three in the Philippines at the time. Although he did not discuss this situation with Ms. Brambilla, he testified that Fred Adams, who conferred with the waiver board, would have been knowledgeable of available vacancies.

pretextual. Mr. Barth's medical condition was already complicated. He had experienced neuropathies in his hands and legs. He had an unhealed ulcer on his foot prone to infections in countries with inadequate sanitation. He needed periodic examinations to ensure that his foot care was adequate. He had also suffered proliferative retinopathy that had to be treated with laser therapy, requiring ophthalmological examinations every three to four months.[10] He needed examination by an internist every three months to evaluate the diabetes, and probably by a vascular surgeon to check his circulatory problems.

Nevertheless, Mr. Barth's challenge to these conclusions was extensive. Among other criticisms, he contends that no precise standard was applied, that Dr. Zweifel, a family practitioner with no special endocrinology training, was unqualified to render advice, that medical facilities at the sites were, in some instances, far better than the waiver panel recognized, that there should have been a far more complete and effective investigation into his health, that he is entirely capable of managing his own health with the aid of his wife and advice from his doctor by long distance telephone, and that throughout the process the VOA failed to recognize his rights as a handicapped person. He minimizes the risks to his health, the possibility that he might be unable to get insulin, and the chances of any life threatening emergency, and argues that other healthy Specialists have emergency injuries.

However, Mr. Barth did not and the record created at trial does not present any persuasive proof that the VOA conclusion was erroneous after all key participants testified subject to cross-examination.

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[10] Mr. Barth's counsel made much of the fact that the only written statements in the record of Mr. Barth's ophthalmologist's specific view that frequent eye exams were required post-date the October 1988 waiver decision. This is of no consequence, given the general understanding by Dr. Zweifel, after consideration of the ophthalmologist's pre-decision letter, of Mr. Barth's condition.

There was confusion and disagreement throughout the proceedings before the Court as to whether or not VOA was required to question at the time and prove at trial the competence of the medical judgments on which it relied. The Court accepts that the government's statutory obligation to employment of the handicapped includes an obligation to obtain adequate information regarding medical conditions, corresponding limitations, and available facilities. Accordingly, where a plaintiff has presented medical information to the agency and complains the agency did not competently evaluate it, the Court must examine this charge and consider evidence of the plaintiff's actual condition and available facilities, rather than simply accept the government's understanding of these underlying conditions at the time of its decision. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288, 107 S.Ct. 1123, 1131, 94 L.Ed.2d 307 (1987) (court must conduct individualized inquiry into condition of Rehabilitation Act claimant, with deference to "the reasonable medical judgments of public health officials"). This was accomplished at trial through the testimony of Mr. Barth's doctor and cross-examination of State Department doctors. This evidence tended to confirm both the adequacy of VOA's efforts at the time and the accuracy of VOA's decision in retrospect.

There was no obligation under the circumstances, as Mr. Barth contends, for VOA or State Med officials to meet with his doctors, whose own submissions at the time of the waiver decision, which the waiver panel carefully considered, tended to confirm the conclusion of State Med that Mr. Barth's health would not allow permanent assignment to the Foreign Service. The letter from Mr. Barth's endocrinologist Dr. Ball to the waiver panel stated in part:

> At the present time I have no problem with Mr. Barth's functioning in an overseas environment as long as there is a competent physician available to

> him should he become ill. I would anticipate that that physician should be available to him the same day of illness, as would be appropriate for any diabetic patient.
>
> I personally have no way to anticipate acute illness, but from past experience with State Department personnel, I believe it is fair to say that as long as there is a competent physician available to the personnel of the particular post, then I would believe that Mr. Barth could be assigned. On the other hand, if he were assigned to an area in which no competent medical care would be available for forty-eight to seventy-two hours, then I would feel that that would be an inappropriate assignment.

DX 3. Dr. Ball testified at trial that by "available" he meant "available by telephone," but this certainly was not apparent from the letter, and the waiver panel members quite reasonably took it to mean "available in person." Under the circumstances, the Rehabilitation Act did not require VOA to determine by follow-up call whether Dr. Ball meant "available by telephone."

At trial, Dr. Ball, a skilled endocrinologist, acknowledged that in fall 1988 Mr. Barth was not a well-controlled diabetic and that about half the sites would be inappropriate given Mr. Barth's condition. He also testified that it was never conveyed to him at the time that Mr. Barth was seeking a permanent appointment to the Foreign Service, rather than a more limited assignment abroad. Moreover, his view that Mr. Barth could manage his diabetes by maintaining telephone contact with him was offered without close knowledge of the stresses related to the specific job or the conditions under which the work would be performed—for example, record evidence indicated poor telephone service at various sites. Dr. Ball has accommodated Mr. Barth brilliantly at home, but the testimony of those with first-hand experience overseas, although they were less skilled in endocrinology, was more reliable.

The concern raised by Mr. Barth's counsel as to the waiver panel's lack of reference to precise standards was justified but not dispositive. The record did not show that VOA, in making the waiver decision, paid careful attention to the specific factors outlined in the Rehabilitation Act regulations. Nor was there a written record of proceedings or statement of reasons other than a rote recitation of the four factors set out in section 684.7-5 of the Foreign Affairs Manual. DX 11, 12. This is troubling in the handicap discrimination context. In cases involving race, sex or age discrimination, the decision under review is a straight employment decision which the reviewing court then scrutinizes for signs of bias. In a handicap case, by contrast, the employment decision itself is essentially the same decision—a legal determination of what constitutes "reasonable accommodation"—that the court is ultimately required to address. At least where the defendant is the federal government itself, a statement of reasons, explained in terms of the requirements of the Rehabilitation Act and regulations thereunder, would greatly assist the process. Such findings could help prevent decisions made on the basis of factual errors or misunderstandings and provide a contemporaneous justification for the decision that could be evaluated.

Although the lack of findings hindered the Court's de novo review, the record now before the Court, which focused sharply on the Rehabilitation Act standards, demonstrates that, in general, the waiver panel did focus on whether a reasonable accommodation could be made to Mr. Barth's handicap and, moreover, that the decision was proper and consistent with the requirements of the Rehabilitation Act. The thin staffing at each post required flexibility of assignment, put a premium on workers not subject to serious health risks, and offered few options for initial assignment of Mr. Barth. Accepting applicants who could basically only work on a few non-hardship posts would be considered unfair to other Specialists and detrimental to morale and success of the program. The

Court independently finds that at the time he sought waiver Mr. Barth could function at only three or four posts and that as a matter of law such an accommodation would place an undue burden on the VOA program.

Nevertheless the procedural deficiencies indicated by the record are troubling. In a typical administrative law context, remand might be considered. Here, however, the Court cannot direct a reconsideration of the prior record. Mr. Barth's condition is subject to change and deterioration. The number and status of the various relay stations has changed. The number of available positions is small. It is inappropriate to stage an artificial rerun of the prior decision without regard for present realities. More importantly, the evidence clearly showed that the correct result in terms of the requirements of the Rehabilitation Act was ultimately reached.

However, while judgment must be granted to defendants and the complaint dismissed, this shall be without prejudice to Mr. Barth's right to apply after this date for permanent or temporary overseas duty or assignment with VOA. Any such application should be processed with specific procedures addressing appropriate Rehabilitation Act standards.